Google Inc. et al v. Egger et al Doc. 450

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**UNITED STATES DISTRICT COURT**

**DISTRICT OF OREGON**

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| AL-HARAMAIN ISLAMIC FOUNDATION, *et al.*,<br><br>Plaintiffs,<br>v.<br><br>GEORGE W. BUSH, *et al.*,<br><br>Defendants. | CV. 06-274- KI<br><br>**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION FOR A STAY PENDING INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(b)** |

## INTRODUCTION

In its Opinion and Order of September 7, 2006 (hereafter "Op."), the Court denied Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment (with leave to renew the latter motion). The Court certified its decision for interlocutory review under 28 U.S.C. § 1292(b). *See* Op. at 32. In addition, the Court indicated that, if the parties chose to

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appeal, and if the appeal is taken, the parties may move to stay proceedings in the district court. *See id*. On September 20, 2006, Defendants filed a petition for interlocutory review of the Court's decision with the Court of Appeals for the Ninth Circuit ("1292(b) petition"). Defendants now move for a stay of further proceedings pending appeal.[1]

At this time, the most appropriate course would be to stay further district court proceedings until the Court of Appeals decides whether to take Defendants' appeal, and then pending any such appeal. The central issue before the Court of Appeals is whether this case should have been dismissed at the outset on state secrets privilege grounds. In particular, the United States has sought appellate review concerning a key state secrets question decided by this Court: whether there is a reasonable danger to national security if it is confirmed or denied whether Plaintiffs were subject to the alleged surveillance that Plaintiffs claim may be reflected in the classified document filed under seal in this case ("Sealed Document"). Because the Court's Order contemplates further proceedings based on this determination, and because those proceedings risk the disclosure of additional privileged information to Plaintiffs and the public at large, a stay is warranted to preserve a threshold question of privilege on appeal—one that raises a serious issue of harm to national security. In addition, as set forth below, further discovery proceedings may be futile pending the outcome of an appeal.

## BACKGROUND

This lawsuit concerns whether or not Plaintiffs have been subject to surveillance by the National Security Agency ("NSA") under the Terrorist Surveillance Program ("TSP") without a judicial order authorizing such surveillance pursuant to the procedures set forth in the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. § 1802 *et seq*. Plaintiffs filed their Complaint

[1] In its text order of October 4, 2006, the Court granted Defendants leave to file this motion before the Court of Appeals has ruled on the 1292(b) petition. *See* Dkt. No. 81.

in this action on February 28, 2006, *see* Complaint (Dkt. No. 1), alleging that they were subject to surveillance by the NSA in March and April of 2004. Plaintiffs further allege that this surveillance was conducted without a warrant in violation of the FISA and the Fourth Amendment, and in excess of the President's authority under Article II of the Constitution. *See id*. ¶¶ 4-6, 19, 27-29. From the outset, Plaintiffs have based their claims on information allegedly contained in the Sealed Document inadvertently disclosed to them.

On June 21, 2006, Defendants moved to dismiss or, in the alternative, for summary judgment, on the grounds that the very subject matter of the claims raised in this case requires evidence that is protected by the state secrets privilege asserted by the Director of National Intelligence ("DNI"). *See* Dkt. Nos. 56-59. In particular, the DNI asserted a claim of privilege as to information contained in the classified Sealed Document, which the DNI explained remains properly classified and privileged, notwithstanding its inadvertent disclosure to Plaintiffs. *See* Public Declaration of John D. Negroponte, ¶¶ 11(iv) and 14 (Dkt. No. 59, Exh. #1).[2/]

In denying Defendants' motions to dismiss, the Court agreed with Defendants that the unauthorized release of the Sealed Document to Plaintiffs did not waive the state secrets privilege as to this document or declassify its contents. *See* Op. (Dkt. No. 79) at 14, 24. The Court observed that "because the government has not officially confirmed or denied whether plaintiffs were subject to surveillance, even if the plaintiffs know they were, this information remains secret." *Id.* at 14. However, the Court also suggested that further discovery proceedings may be possible as to information contained in the Sealed Document because Plaintiffs have reviewed the document and, thus, its contents are not a secret to them. See Op. 15-19, 26.

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[2] *See also In Camera*, *Ex Parte* Declarations of John D. Negroponte, Director of National Intelligence, and Lt. Gen. Keith T. Alexander, Director of the National Security Agency, Dkt. No. 56 (Notice of Lodging).

Specifically, the Court found that, because the Plaintiffs know what information the Sealed Document contains, "no harm to the national security would occur if plaintiffs are able to prove the general point that they were subject to surveillance as revealed in the Sealed Document, without publicly disclosing any other information contained in the Sealed Document." *See* Op. at 16. The Court did find that "plaintiffs do not know whether or not their communications were intercepted beyond any that may be identified in the Sealed Document, and they do not know whether their communications continue to be intercepted." *See id.* Indeed, as to information concerning any surveillance beyond that which might be reflected in the Sealed Document, including any current surveillance, the Court upheld the Government's state secrets privilege assertion, finding that disclosure of such information would create a reasonable danger of harm to national security. *See id.* at 16-17. However, as to what is contained in the Sealed Document, the Court concluded "there is no reasonable danger that national security would be harmed if it is confirmed or denied that plaintiffs were subject to surveillance as to the event or events disclosed in the Sealed Document" without disclosing any other information therein. *Id.*

Based on this determination, the Court concluded that the "very subject matter of this litigation" is not a state secret that would require dismissal. *See Op*. at 17-19. The Court found that "if plaintiffs are able to prove what they allege—that the Sealed Document demonstrates they were under surveillance—no state secrets that would harm national security would be disclosed." *Id.* at 19. Accordingly, while the Court stated that it may eventually terminate some of all or Plaintiffs' claims, it declined to dismiss the case at this time "on the ground that the government's state secrets assertion will preclude evidence necessary for plaintiffs to establish standing or make a *prima facie* case, or for the government to assert a defense." *See id.* at 20.

Instead, the Court ruled that Plaintiffs "should have an opportunity to establish standing and make a *prima facie* case" by submitting *in camera* affidavits "attesting to the contents of the document from their memories." *See* Op. at 21, 25-26. In addition, the Court urged the Government to again consider whether it would be appropriate to redact the Sealed Document in light of the Court's ruling that it is no longer a secret to Plaintiffs as to what information the document contains. *See id.* at 25. The Court's ruling also contemplates the possibility that some of the information in the document could be shared with Plaintiffs, subject to a protective order; indeed, the Court indicated that it may attempt to disentangle certain details from the Sealed Document. *See id.* at 25-26. The Court recognized that the Government believes this process would be futile, but declined to dismiss the case without examining all options that would allow Plaintiffs to seek relief. *See id.* at 21-22.

The Court accordingly directed the parties to proceed to the discovery phase of this case. *See* Op. at 32. The Court indicated that it would schedule a discovery conference at which the parties should be prepared to address several issues, including: (i) possible redactions to the sealed document[3/]; (ii) possible stipulations; (iii) item-by-item review of interrogatory requests to consider whether *in camera* responses would be appropriate; (iv) depositions; and (v) the potential hiring of an expert to assist the Court in determining whether any disclosures may reasonably result in harm to national security. *See* Op. at 30, 32.

At the end of its decision, the Court, *sua sponte*, certified its order for interlocutory appeal under 28 U.S.C. § 1292(b). *See* Op. at 32. The Court explained that it "recognized, as did Judge Walker in [*Hepting v. AT & T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006)]," that its decision involved "'a controlling question of law' about which there is 'substantial ground for

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[3] The Court granted Defendants' motion to deny Plaintiffs further access to the Sealed Document and ordered Plaintiffs to return all copies. *See* Op. at 23-26. Defendants do not seek a stay of this aspect of the Order and assume that Plaintiffs have now complied.

difference of opinion,'" and that interlocutory appeal was warranted because such an appeal "'may materially advance the ultimate termination of this litigation.'" *Id.*[4]

## ARGUMENT

A district court has discretionary power to stay proceedings in its own court. *Landis v. North American Co.,* 299 U.S. 248, 254 (1936). In particular, "[a] trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case." *Levya v. Certified Growers of California, Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979); *see also Mediterranean Enterprises, Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1465 (9th Cir.1983).

> Where it is proposed that a pending proceeding be stayed, the competing interests which will be affected by the granting or refusal to grant a stay must be weighed. Among those competing interests are the possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay.

*Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2004) (citing *CMAX, Inc. v. Hall*, 300 F.2d 265 (9th Cir.1962)).

A stay pending appeal is the most appropriate course at this time, for two major reasons. First, a threshold issue of privilege is before the Court of Appeals—whether this case should be dismissed on state secrets grounds and, in particular, whether information contained in the Sealed Document is properly protected by the state secrets privilege. Further district court proceedings risk the disclosure of privileged information to Plaintiffs and the public at large, and thus, in Defendants' view, risk serious harm to national security. Second, further proceedings may be futile for several reasons, including most obviously that an appeal may resolve all issues in this case.[5]

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[4] Defendants asked the Court of Appeals to grant its 1292(b) petition but then to hold any appeal in this case pending the outcome of the 1292(b) petition filed by the Government in the *Hepting* action, and the outcome of that appeal. The *Hepting* case also concerns the Terrorist Surveillance Program and raises many of the same questions presented here, and the Government's 1292(b) petition in *Hepting* has been pending longer and will likely be acted upon sooner.

## I. A STAY PENDING APPEAL IS WARRANTED TO PRESERVE A THRESHOLD QUESTION OF PRIVILEGE ON APPEAL THAT RAISES A SERIOUS ISSUE OF HARM TO NATIONAL SECURITY.

In denying Defendants' motion to dismiss, the Court decided a threshold issue of privilege that set the stage for further proceedings. Specifically, the Court found, contrary to the DNI's judgment, that there would be no reasonable danger to national security to confirm or deny if the Sealed Document reveals whether or not Plaintiffs were subject to surveillance in 2004. *See* Op. at 17. Although the details of the DNI's assertion of privilege as to the Sealed Document cannot be publicly addressed, Defendants have set forth at length why information in the document remains privileged, despite its inadvertent disclosure to Plaintiffs, and why it would harm national security to either confirm or deny to Plaintiffs or the public at large whether Plaintiffs' allegations and assumptions about the document are correct. Defendants have now petitioned the Court of Appeals to review whether this case should have been dismissed on privilege grounds. In such circumstances, a stay pending appeal is appropriate to avoid irreparable harm to the party claiming privilege should there be any disclosures of privileged information in further district court proceedings—which would effectively moot the appeal. *See, e.g., United States v. Griffin*, 440 F.3d 1138, 1142 (9th Cir.) (where privilege assertion is at issue on appeal, the party claiming privilege will suffer "the very harm that he seeks to avoid" if his assertion of privilege is correct but not reviewed on appeal); *cert. denied*, ___S.Ct. ___, 2006 WL 2066670 (2006); *see also Center for National Security Studies v. U.S. Dep't. of Justice*, 217 F. Supp. 2d 58, 58 (D.D.C. 2002) (granting stay pending appeal where disclosure under FOIA would moot an appeal), *aff'd in part, rev'd in part*, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1104 (2004); *Providence Journal Company v. FBI*, 595 F.2d 889 (1st Cir. 1979) (same).

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[5] While the Court did not enter any injunctive relief, Defendants would also satisfy the balancing test utilized by the Ninth Circuit for staying an injunction pending appeal. Under this standard, the Court would weigh certain factors along "a single continuum": at one end of the continuum, the moving party is required to demonstrate probable success on the merits and the possibility of irreparable harm, and at the other end, the party is required to show that serious questions have been raised and the balance of hardships tips sharply in the moving party's favor. *Artukovic v. Rison*, 784 F.2d 1354, 1355 (9th Cir. 1986); *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir.), *rev'd in part on other grounds*, 463 U.S. 1328 (1983). The "relative hardship to the parties" is the "critical element" in deciding at which point along the continuum a stay is justified. *Lopez*, 713 F.2d at 1435 (internal quotation marks omitted). In addition, the public interest is a strong additional factor. *Artukovic*, 784 F.2d at 1355. The Court's denial of Defendants' motion to dismiss obviously presents serious questions, as this Court has already found in certifying its Order. *See* Op. at 32. And, as set forth herein, the Government faces serious and irreparable harm to their interests if further proceedings result in the disclosure of information that should be protected for national security reasons.

Further district court proceedings would indeed risk the disclosure of privileged information not already known to Plaintiffs or the public at large. First, the very purpose of the *in camera* proceedings contemplated by the Court's order would be to determine if Plaintiffs could establish standing and a *prima facie* case and, thus, proceed to the merits of their claims. However, if, after further *in camera* proceedings, the Court decides that the case may proceed, such a decision would necessarily tend to confirm or deny to the public a fact that Defendants believe is properly privileged—*i.e.,* whether the Plaintiffs were subject to surveillance. Thus, whatever Plaintiffs may recall of the Sealed Document and whatever they may argue to the Court *in camera*, the process contemplated by the Court would be futile where any determination in Plaintiffs' favor would be reflected on the public record and implicate the very issue of privilege for which appellate review is being sought. While it is possible that the Court may not find in Plaintiffs favor, Defendants cannot waive this opportunity for appellate review where information we deem privileged may be publicly disclosed and thereby harm national security, particularly where the Court has already found that there would be no harm to national security from such a disclosure and, in recognition of the significance of that decision, certified its decision for interlocutory review.

Second, further proceedings, even *in camera*, risk disclosure to Plaintiffs of privileged information they do not already know. It should be apparent that Plaintiffs have engaged in speculation as to whether they have been subject to warrantless surveillance under the TSP, as their own admissions during the August 29 hearing confirmed.[6/] Plaintiffs seek to discover facts

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6 *See* Transcript, 8/29/06 at 60:6-61:9:

> THE COURT: Let me ask you -- this may be way ahead of it -- how are you going to show that any surveillance in this case was warrantless?
>
> MR. EISENBERG: That is a very interesting question, and we pondered that a lot. I would like to think that if they had a FISA warrant, that [Government Counsel] would have told us quite a while back, so we wouldn't be wasting any more time.
>
> THE COURT: Well, [Government Counsel] may feel that's a state secret or at least the people who instruct [Government Counsel] may feel that's a state secret.
>
> MR. EISENBERG: It could be, and then we have a bit of a problem. I believe the simple way, how do we know it was warrantless? Discovery. And that really is just about, I think, the only thing in our motion for discovery, which Mr. Goldberg will address -- it's not the only. It stands above all others. It's an essential link in our case, but it's a simple one. I think the simple answer is we ask them, "Did you have a FISA warrant?"
> . . .
>
> THE COURT: I suspect they are going to refuse to answer. Then I have to make a determination as to whether I'm going to require them to answer. And in doing that, I have to determine whether or not the answer would divulge a state secret.
>
> MR. EISENBERG: I wonder if you could imply from their refusal

(continued...)

that they do not know, including the essential fact of whether they were subject to warrantless surveillance under the TSP. Indeed, even if Plaintiffs believe they have enough information from the Sealed Document to make deductions about its meaning, the extra step of official confirmation or denial by the Government or the Court would be required before Plaintiffs could prove any part of their claims. Thus, there should be little doubt that further proceedings as to what, if anything, the Sealed Document indicates concerning any surveillance of Plaintiffs will involve the disclosure or confirmation of new information—particularly where there is inherent uncertainty in attempting to obtain proof from a single document, which may be unclear, out of context, contain errors, and improper evidence.

Even beyond the narrow fact of whether Plaintiffs have been subject to the TSP, *in camera* proceedings may lead to the disclosure or confirmation of other privileged information Plaintiffs would not know merely from reading the document. Not all privilege issues implicated by the document may be apparent on its face. The *in camera* steps contemplated by the Court—during which the parties might address the content of the document and possible redactions thereto, discuss stipulations based thereon, or determine whether information can be revealed through interrogatory responses—may reveal additional privileged information to

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[6](...continued)

> to answer that they didn't have one. We have a problem, don't we?
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> . . . .

*See also id*. at 96:20-97:2 ([MR. EISENBERG]: "If there has been a warrant in this case, I have to *assume* that the Government would have told your Honor in the secret declarations we are not privy to. And I am going to *assume further*, Your Honor, in light of what transpired here today, that the Government has not told Your Honor in classified confidence that there . . .were warrants in this case.") (emphasis added). None of the public statements Plaintiffs alluded to during the hearing remotely demonstrates that they were subject to warrantless surveillance. *See id*. at 61:22-64:7. Plaintiffs obviously do not know whether the Sealed Document demonstrates this fact either.

Plaintiffs. While the Court may take steps to prevent the disclosure of such information, that process cannot necessarily be controlled, because the new disclosures may simply be facts deduced from other facts. Once started, the *in camera* process may lead to unforeseen disclosures that would further undermine the Government's privilege assertion and compound the harm to national security while the very issue of privilege is on appeal.[7] As one court aptly observed about *in camera* procedures in state secret cases:

> Such procedures, whatever they might be, still entail considerable risk. Inadvertent disclosure during the course of a trial—or even *in camera*—is precisely the sort of risk that [*United States v. Reynolds*, 345 U.S. 1 (1953)] attempts to avoid. At best, special accommodations give rise to added opportunity for leaked information. At worst, that information would become public, placing covert agents and intelligence sources alike at grave personal risk.

*Sterling v. Tenet*, 416 F.3d 338, 344 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1052 (2006); *see also Halkin v. Helms*, 598 F.2d 1, 7 (D.C. Cir. 1978) (protective orders "cannot prevent inadvertent disclosure nor reduce the damage to the security of the nation which may result"). Courts are "not required to play with fire and chance further disclosure—inadvertent, mistaken, or even intentional—that would defeat the very purpose for which the privilege exists." *Sterling*, 416 F.3d at 348. Neither, of course, should the Government be required to endure the risk of harm to national security, particularly where it now seeks to appeal the Court's Order.

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[7] In addition, *in camera* proceedings pose other inherent risks of disclosure related to the physical security of information. For example, the process Plaintiffs would use to prepare and file a summary of Sealed Document itself poses security risks, not only in the drafting of a declaration but in discussing the matter among various Plaintiffs and counsel. Plaintiffs' preparation of their current *in camera* declaration on the sealed document and their mishandling of its submission to the Clerk's office illustrates this concern. *See* Transcript, June 19, 2006 (indicating that Plaintiffs' declaration was improperly filed with the Clerk's office, inadvertently opened and copied by unauthorized court personnel, and subsequently ordered to be stored in a secure facility).

## II. FURTHER DISTRICT COURT PROCEEDINGS MAY BE FUTILE WHILE AN APPEAL IS PENDING.

Finally, Defendants believe a stay is warranted now because further proceedings may be futile for several reasons. First, and most obviously, Defendants believe we have already demonstrated that the state secrets privilege warrants dismissal of this action. If the Court of Appeals takes the appeal and agrees, any further proceedings would be pointless. In particular, even if Plaintiffs' standing could be found based on the Sealed Document, and even if such a finding could be rendered without negating Defendants' assertion of privilege (points that Defendants do not concede), the Court of Appeals may find that the case could not otherwise proceed to the merits without implicating classified facts concerning the Terrorist Surveillance Program. If the case cannot proceed on the merits, there is no point pursuing threshold facts as to whether Plaintiffs were subject to warrantless surveillance and, thus, may have standing.

In addition, the Court's decision narrowly limits any further basis for proceeding. Because the Court upheld Defendants' state secrets privilege assertion as to whether the Plaintiffs are presently subject to surveillance, *see* Op. at 16-17, Plaintiffs have no standing to obtain any prospective relief. Even where a plaintiff alleges that his rights were violated in past incidents, he lacks standing to obtain prospective relief absent proof of a "real and immediate threat" that he will suffer the same injury in the future. *City of Los Angeles v. Lyons*, 461 U.S. 95, 103, 105 (1983) (citing *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) and *Rizzo v. Goode*, 423 U.S. 362, 372 (1976)). In light of the Court's decision to uphold the states secrets privilege as to any current surveillance, the proof necessary to litigate the question of prospective relief is unavailable.

Absent any right to prospective relief based on alleged current surveillance, the only claims that could conceivably be litigated are those related to past conduct. But even if Plaintiffs could demonstrate, based on the Sealed Document, that they were subject to prior surveillance, any claim for damages under the Foreign Intelligence Surveillance Act based on past conduct would face clear jurisdictional bars. Notably, in bringing their damages claim, Plaintiffs rely on 50 U.S.C. § 1810. *See* Compl. ¶ 27. However, that provision of FISA is not a waiver of sovereign immunity for the recovery of damages against the United States.[8/] *See* 50 U.S.C. §1810 (authorizing suit only as to "any person" defined in 50 U.S.C. § 1801(m), which does not include the United States). Thus, there is no basis for further discovery proceedings in connection with Plaintiffs' claim for damages under FISA Section 1810.

Moreover, where Congress has waived sovereign immunity to allow damage claims against the United States for violations of FISA, it did so only as to alleged violations of specific FISA provisions that Plaintiffs have not put at issue in their Complaint. *See* 18 U.S.C. § 2712 (authorizing a claim for actual damages against the United States for violations of sections 106(a), 305(a), and 405(a) of the FISA, *see* 50 U.S.C. §§ 1806(a), 1825(a), and 1845(a)).[9/] Even if Plaintiffs had sought damages under these provisions, and they were applicable in this case, and such claims could be adjudicated,[10/] any such claim must first be presented to the appropriate

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[8] The United States, as sovereign, is immune from suit except as it consents to be sued. Except as Congress has consented to a cause of action against the United States, there is no jurisdiction to entertain suits against the United States. *See United States v. Testan*, 424 U.S. 392, 399 (1976); *United States v. Sherwood*, 312 U.S. 584, 587-88 (1941); *Minnesota v. United States*, 305 U.S. 382, 388 (1939). Any waiver of sovereign immunity must be strictly construed in favor of the sovereign. *Orff v. United States*, 545 U.S. 596, ___ 125 S. Ct. 2606, 2610 (2005).

[9] These provisions concern the lawful use and minimization of certain information obtained under FISA. For example, Section 106(a) of the FISA, 50 U.S.C. § 1806(a), requires that any information acquired from an electronic surveillance conducted pursuant to the FISA concerning any United States person be used only in accordance with minimization procedures established by the FISA and for lawful purposes.

[10] Any claim for damages under these provisions plainly contemplates that the Government can and has confirmed the alleged surveillance at issue, which is not the case here.

department or agency under the Federal Tort Claims Act. *See* 18 U.S.C. § 2712(b)(1); *see also* 28 U.S.C. § 2672 (setting forth the procedures for filing an FTCA claim). Absent exhaustion of FTCA administrative procedures, a court would have no jurisdiction over a damages claim based on these provisions of FISA.

Unable to pursue prospective relief as to any alleged current surveillance, or damages against the United States under the FISA based on any alleged prior surveillance, Plaintiffs' sole remaining claim for relief appears to be the disclosure, purging, and disuse of any information about alleged surveillance of them. *See* Compl., Prayer for Relief, ¶¶ 3, 4. Apart from whether the state secrets privilege would preclude litigation of this claim, Plaintiffs' Complaint does not even identify any basis in law for such relief. The Court has already barred Plaintiffs from access to the Sealed Document, and Plaintiffs certainly would not have the right to obtain any other such classified information about them, if it exists. Moreover, Plaintiffs cite no cause of action for their demand that the Government "destroy" or "purge" records in its files—as courts have demanded for record expunction claims. *See, e.g., United States v. Crowell*, 374 F.3d 790, 792-96 (9th Cir. 2004), *cert. denied*, 543 U.S. 1070 (2005) and *United States v. Sumner*, 226 F.3d 1005, 1015 (9th Cir. 2000) (finding no subject matter jurisdiction granted by Congress to expunge an arrest or conviction record); *see also United States v. Janik,* 10 F.3d 470, 473 (7th Cir. 1991) (Congress must confer jurisdiction on federal courts for a plaintiff to obtain expunction of records maintained by any Executive Branch agency); *United States v. Scruggs*, 929 F.2d 305, 305-06 (7th Cir. 1991) (statutory basis for jurisdiction and remedy must be established for expunction claims).[11/] If the Court does not stay this case pending appeal, it

[11] *See also United States v. Smith*, 940 F.2d 395, 396 (9th Cir. 1991) (assuming a court had inherent equitable powers to expunge criminal records, such relief may be granted only in "extreme circumstances").

should at least entertain a motion on whether Plaintiffs are entitled to such expunction relief before proceeding with discovery that implicates the state secrets privilege assertion, since there appears to be no remaining claim as to which such discovery would be relevant.

## CONCLUSION

For the foregoing reasons, Defendants' Motion for a Stay Pending Interlocutory Appeal should be granted.

Dated: October 24, 2006

Respectfully submitted,

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